December 7, 2017

Secure Choice Investment Board
securechoice@sto.ca.gov

SUBJECT: Proposed Regulation:
Title 10, California Code of Regulations, Division 1, Chapter 15
California Secure Choice Retirement Savings Investment Board
Public Comment

Dear Secure Choice Investment Board members and staff,

We first want to recognize and thank you for providing ample opportunity for public input on these regulations, particularly in light of the expedited formal emergency rulemaking process with limited public participation. These written comments reflect our public testimony at your public forum in Sacramento on December 5, 2017.

We, the undersigned organizations have significant concerns over these draft regulations. We also want to remind you that we have submitted written and oral comments outlining some of these same concerns to the board and staff on numerous occasions and before that, to the Legislature throughout the legislative process. We also offered recommendations during the most recent industry stakeholder process regarding employer duties and responsibilities as well as those that should be allocated to the third party administrator (TPA), along with our well thought out reasoning for these recommendations. Through this set of comments, we will reiterate many of those points and introduce new ones pertinent to the language in the draft regulation.

Underground regulations. We strongly oppose any vaguely worded regulation that leaves room for the board or staff to create formal policy that impacts employers outside of the administrative procedures act requirements. Furthermore, regulations are intended to provide guidance and information to the public that must comply with the rules. The regulations as drafted are not clear in a number of provisions, and leave out critical instructions for employers to be able to understand their obligation. The process is intended to create accountability for the agency and transparency to the public. A lack of clear guidance through regulations will only lead to confusion, uncertainty and keep employers from a sense of engagement if they don't understand the rules, or believe they are being tricked.

Regulations adopted by state agencies must comply with the Administrative Procedures Act (APA). As defined by the APA, a regulation is every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

If an agency issues, utilizes, enforces, or attempts to enforce a rule without following the APA when it is required to, it is an underground regulation. State agencies are prohibited from enforcing underground regulations.

We interpret this rule to require agencies to go through the formal rulemaking process with public input for all substantive policies that implement statute, where the statute has left room for interpretation and implementation of legislative intent.

ERISA and the enrollment process. The employer community has been outspoken about the liability that could be created by this program in terms of employer exposure to ERISA for those that are mandated by the state to participate. It is imperative that the employer have no involvement with the program other than minor administrative functions. Therefore, the success of the program for employers depends on the TPA exercising a strong intermediary role between the employer and employee to ensure extremely limited interaction with the employee and prevent actions that could be construed as or evolve into an employer's endorsement or sponsorship of the program.

This regulation imposes more responsibilities on employers than we are comfortable with. For example, in Section 10004(a)(4) of the draft regulation, employers should not be required to collect the acknowledgement form or the opt-out form. Both can be sent directly to the TPA by the employee, either electronically or through the mail. No employer involvement is necessary here. Further, in Section 10004(a)(6) of the draft regulation, employers should not be mandated to inform employees of their limited liability and responsibilities under this program. The statute requires a disclosure to this fact be contained in the informational packet to eliminate the need for this discussion and instruct employees to direct any questions to the program administrator. Although the 2016 United States Department of Labor safe harbor regulation has been revoked, we encourage the board and staff to consider the limited role envisioned for the employer contained within as a starting point for this regulation.

Further, we encourage the board and staff to be mindful that given the nature of the employment relationship, employees will want to seek out their employers for clarification and instruction regarding their decision to participate in this program. It is essential that systemic mechanisms are in place to redirect employees to the TPA to handle their questions and concerns and not the employer.

Information packet and disclosures. We continue to object to using the acknowledgment of receipt of the employee disclosure as a consent form for enrollment into the plan, which is inconsistent with the legislative intent of the program. As employers advocated for and provided structure to the disclosure, we assert that the purpose of the form is to inform employees from a consumer protection function and to protect employers.

Section 100014(d) of the statute states, *"The disclosure form shall include a method for the employee to acknowledge that the employee has read all of the disclosures and understands their content."* It was never intended to serve as an opt-in or to exclude employees that do not sign the acknowledgement form.

A significant aspect of this rulemaking is the handing of the enrollment process and the operation of the automatic enrollment provision. The process must seek to ensure protection for employers from liability as well as to minimize their administrative burden. Throughout the genesis of the legislation, it was always the intent that this be an automatic enrollment program in order to facilitate maximum participation.

As a separate function, the disclosure is part of the employee information packet that contains an opt-out form should the employee choose not to participate. Providing the disclosure is intended to protect the employer and ensure the employee is fully informed about the program they have been enrolled in so to make an informed decision regarding continued participation. The acknowledgement by the employee that they have received the disclosure documents and information about the program is separate from the automatic enrollment. The acknowledgement is simply part of the administrative function, which we assert would be best performed by the TPA. Again, the acknowledgement by the employee was not envisioned nor contemplated to serve as an opt-in or as making enrollment contingent upon it.

Lastly, regarding the disclosures related to employer liability, responsibility and advice restrictions, we request the board and staff involve and consult with us in the development and design of the document (i.e. font size, color and wording) to ensure employees are properly and adequately noticed that this is a government-run retirement savings program and not one sponsored by their employer.

Missing provisions from the draft. The draft regulations are not specific about some elements of the process, such as how forms are handled, who provides what to whom, and specifically how enrollment occurs. We continue to advocate for a process that limits the employer's function, shifts primary communication and operations with employees to the TPA and is honest with employers and employees.

A number of provisions of the statute are not clarified in the regulations that we believe should be in order to avoid being developed as underground regulations:

- Identification of who tracks contribution limits, who notifies the employee if they have reached it or are close to the limit, and what happens to overpayments beyond the limit.
- Process for employees to take their money out either in its entirety or partial withdrawal of funds. Is a hardship required to make a withdrawal? What are the rules surrounding these functions?
- What constitutes a hardship? The number of times employees will be allowed to invoke a hardship situation; whether there will be a cap and if so, what is the amount?
- What is the employee opt-out process, what are timeframes – how long after an employee provides notification is their money returned?
- If there is a dispute between employee and employer, between employee and TPA or between employer and TPA, what is the dispute resolution process?
- What happens when an employer drops below 5 employees?

Most, if not all, of these functions should be handled by the TPA and should be specified in the RFP and in the regulations. As written, without the specific processes, the development of policy to address these items without formal regulation is likely underground regulation and not enforceable.

Definition of eligible employer. Using the employers report to EDD that merely states how many employees in total they had over the quarter is problematic for those that may generally employ below the threshold but can experience worker increases with a combination of employees over short periods of time throughout the quarter or the year. We don't know what the answer is, but suggest further exploration of alternatives so that employers that don't really have five employees are not subject to the mandate. One suggestion is that employees that are employed less than 30 days would not be counted towards the eligible employer determination, and would not be enrolled into the program.

Open enrollment. The open enrollment period is intended to provide an opportunity for employees that have previously opted-out during the enrollment period, or subsequently after having been enrolled. It was included in the statute in order to minimize employer burdens. It is intended to be the sole opportunity for employees to re-enroll once they have opted-out. Employees should not be allowed to re-enroll at any time after opting-out (Section 10003 (j)), open enrollment is for that purpose so that employers are not handling employee opt-ins at random times throughout the year. The TPA should handle the open enrollment process to minimize disruptions to work flow by taking it out of the hands of the employer, particularly since the information packet and enrollment process must be repeated during this period. The statute clearly requires an open enrollment period yet it is not clarified in the draft regulations.

Voluntary enrollment prior to mandate. If employers are allowed under Section 10003 (d) to enroll voluntarily prior to their mandated time, they could be deemed to be offering an employee benefit and subject to ERISA requirements. Voluntary enrollment must not be an option, although early registration could provide a convenience for employers.

Pilot program. While the concept of a pilot program has merit, the process and requirements need to be specified in the regulations. Will it be voluntary, random selection? If it is voluntary, how do you shield employers from ERISA exposure?

Self-certification by exempt employers. Section 10004 (b) of the draft regulations specifies a method for exempt employers to certify their exemption from the program will be provided to employers. We believe this section should be stricken altogether as we also oppose an employer self-certification process. Furthermore, this section leaves the specifics to be developed by the program, which could result in underground regulations.

Default investments - ROTH versus Traditional IRA. We recommend a Traditional IRA as the default investment. This option eliminates the problem of determining who is eligible based on household income and who will make that determination. For employers that provide higher wages, this creates a situation where the employer must advise the employee regarding contribution limits and eligibility, or some other mechanism must be provided. For employers providing the advice, it puts them in a risky situation for providing advice and becoming a plan sponsor.

Additionally, as we learned during the November Secure Choice Board Meeting, mandating a ROTH IRA as the default could mean imposing a mandate that some employers can never comply with because none of their highly compensated employees will be able to qualify. Such action will defeat the policy purpose of the program.

A Traditional IRA is an investment vehicle that encourages retirement saving by discouraging early withdrawal. Conversely, a ROTH IRA can operate simply as a tax deferred savings account because the money can be taken out without penalty at any time. While we understand the board's market analysis concluded that a ROTH would facilitate higher enrollment, it could also create volatility and higher administrative costs without actually creating dependable retirement savings. Utilization of a Traditional IRA can create long-term financial stability in the Secure Choice fund by discouraging frequent and sizable withdrawals that could negatively impact investment strategies and returns. The state should not simply establish a tax-deferred savings account to address the growing retirement crisis.

Another significant missing piece of the puzzle is the impact on eligibility for safety net services – is there a different impact for ROTH savings as compared to Traditional IRA savings? If we truly wish to encourage and facilitate a retirement savings plan, a Traditional IRA would be a more appropriate option.

For further discussion or information, please contact Marti Fisher, California Chamber of Commerce, marti.fisher@calchamber.com, or Nicole Rice, California Manufacturers and Technology Association, nrice@cmta.net.

Sincerely,

California Chamber of Commerce
Association of California Life & Health Insurance Companies
California Association of Winegrape Growers
California Business Roundtable
California Farm Bureau Federation
California Framing Contractors Association
California Manufacturers and Technology Association
California Professional Association of Specialty Contractors
California Restaurant Association
California Retailers Association
Family Business Association of California

MF:ldl